(4)

**IN THE HIGH COURT OF JUDICATURE AT BILASPUR (CG)**

**CRIMINAL APPEAL NO.** 473 **OF 2005**

**APPELLANTS** : 1. Nanku Patel S/o Tilak Ram Patel ,aged about 55 years, occupation labourer, resident of Birjhupali, Aamamona District Bargarh (Orissa).

IN JAIL

2. Dukalu Patel S/o Gethal Patel, aged about 35 years, occupation labourer, resident of Birjhupali, Aamamona District Bargarh (Orissa).

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**VERSUS**

**RESPONDENT** : The State of Chhattisgarh, through the District Magistrate Raigarh (CG).

**MEMORANDUM OF CRIMINAL APPEAL UNDER SECTION 374 (2) OF CRIMINAL PROCEDURE CODE READ WITH SECTION 32 OF N.D.P.S.ACT**

(22)

**HIGH COURT OF CHHATTISGARH, BILASPUR**

**Single Bench:- Hon'ble Shri Justice Dhirendra Mishra**

**Criminal Appeal No. 473 of 2005**

**Appellants** :- 1. **Nanku Patel**
2. **Dukalu Patel**

***Vs***

**Respondent** :- **State of Chhattisgarh**

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Appellants by Shri Shailendra Dubey, Advocate.
State by Shri D.K.Gwalre, Panel Lawyer.

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**JUDGMENT**
**( Delivered on** 29/07/**2005)**

Heard finally.

2. The appellants have preferred this criminal appeal under Section 374(2) of the Code of Criminal Procedure (in short 'the Code') read with Section 32 of the Narcotic Drugs and Psychotropic Substances Act, 1984 (for brevity 'the Act') as they are convicted by the impugned judgment dated 19.05.2005 passed in Special Case No. 05/2004 by the learned Special Judge (N.D.P.S. Act), Raigarh and by which the appellants are convicted under Section 20(b)(ii)(c) of the Act and sentenced to undergo rigorous imprisonment of 10 years and fined Rs. 1,00,000/-, in default thereof, to further undergo rigorous imprisonment of one year to each of the appellants.

3. The case of the prosecution is that a secret information of Ex.P/2 was received by the police to the effect that the appellants carrying ganja in a plastic bag for the purpose of sell, are coming from Orissa and proceedings towards Sariya. Thereafter, on the basis of above information, Investigating Officer (I.O.) namely Shyam Sidar along with his staff proceeded towards Sariya Barpali, Devgaon Road for conducting raid after recording the same in the daily diary of the police station vide document of Ex.P/7. When the appellants who were coming on a

motorcycle were intercepted by the police, the motorcycle was being driven by appellant Nanku Patel whereas appellant Dukalu Patel was the pillion rider who was holding the white plastic bag. The appellants were given option whether they wish to be searched by the Magistrate or by the Investigating Officer whereupon the appellants consented for their search by the I.O. in writing vide document of Ex.P/17. The raiding party gave their personal search vide document of Ex.P/18 and thereafter, on being searched in the presence of witnesses, white plastic bag placed on the motorcycle of Nanku Patel was seized which was containing ganja like material. The search memo is marked as Ex.P/19. The ganja was examined by smelling and also by burning. The copy of verification memo of the contraband is Ex.P/20. Thereafter, weighment of the contraband was done and it was found that the bag contains 20.100 kg. of ganja. The weighment memo is Ex.P/22. The ganja was seized vide document of Ex.P/27 and two samples of 50 gms each was taken out from the seized ganja which was kept in two different packets and seal was affixed on those packets. The sample of the seal by which the packets of samples of ganja were sealed is Ex.P/24. The motorcycle on which the ganja was carried by the appellants was also seized vide document of Ex.P/28. First Information Report was recorded on 23.09.2003 at about 12.00 noon vide document of Ex.P/30. Before proceeding to conduct raid, the I.O. sent a memo dated 23.09.2003 informing the nature of information received and also informing that he is proceeding to conduct raid without obtaining search warrant as the matter is urgent.

4. The appellants were arrested vide arrest memo of Ex.P/31 and P/32. Two samples of the contraband were sent to Forensic Science Laboratory (F.S.L.) for chemical examination along with FIR, seizure memo and sample of seal by the Superintendent of Police, Raigarh which was duly received on sealed condition by the State Forensic Science Laboratory, Raipur, acknowledgement of which is Ex.P/34. The seized contraband and two samples were entrusted to the Malkhana Muharrir and the same was recorded at Sanha No. 663. The report of F.S.L. is Ex.P/36.

5. After investigation as above, the chargesheet was filed in the Special Court and the Special Court framed charge under Section 20(b)(ii)(c) of the Act against the appellants. The appellants abjured their guilt

whereupon the prosecution examined in all six witnesses namely Constable Irniyush Lakda P.W.1, Constable Pulikar Bakhla P.W.2, Head Constable Jaimangal Nishad, Kotwar Pancham Chouhan P.W. 4, Driver Sanjay Kumar Sharma P.W. 5 and Sub-inspector Shyam Kumar Sidar P.W. 6. Thereafter, statements of the appellants under Section 313 of the Code were recorded and after hearing the parties, learned trial Court convicted the appellants and sentenced them as above. Hence, this appeal has been preferred.

6. Learned counsel for the appellants submits that the learned Special Court convicted the appellants only on the basis of statement of the I.O. P.W. 6 and the Panch witnesses P.W. 4 Pancham Chouhan, P.W. 5 Sanjay Sharma who were examined by the prosecution in support of its case, have not supported the case of the prosecution and as such their signatures on all the papers were obtained by the police in police station as P.W. 4 is Kotwar and was on the guard duty in the police station and another Panch witness is a driver whose vehicle is engaged in the police station. He further submits that even the seized ganja has not been produced before the Court and as such serious prejudice has been caused to the appellants because of non-production of material object by the prosecution. Relying upon the judgment of the Hon'ble Apex Court delivered in the matter of ***Jitendra and Another Vs. State of M.P.*** reported in ***2003 SAR (Criminal) 902 Supreme Court*** learned counsel for the appellants submits that the seizure Panchnama is nothing but a document written by the concerned police officer.

7. The next ground taken by learned counsel for the appellants is that there is no evidence available on record to show that the appellants were in exclusive possession of the seized contraband. He further submits that according to the case of the prosecution appellant Nanku was driving the motorcycle whereas other appellant Dukalu was the pillion rider who was holding the bag containing contraband which was kept in a plastic bag lying on the motorcycle and seizure of 20.100 kg of ganja is shown to have been effected from the possession of the present appellant Dukalu who is also owner of the motorcycle. Relying upon the judgment of Hon'ble Apex Court delivered in the matter of ***Narcotic Control Bureau, Jodhpur Vs. Murlidhar Soni and Ors*** reported in ***2004 Cr.L.R. (SC) 524***

learned counsel for the appellants argues that the prosecution has failed to prove that the appellants were in conscious possession of the seized contraband. It is further contended that though the contraband is shown to have been seized from the appellants and thereafter two samples of 50 grams each was taken out from the seized contraband and the same was sealed but there is no evidence that the specimen of the seal was either deposited in the Malkhana or sent along with the samples to F.S.L. and therefore, in the absence of link evidence, possibility of the sample being tampered with cannot be ruled out.

8. Placing his reliance on the judgment delivered in the matter of ***Rajan Ali Vs. State (Delhi Administration)*** reported in ***2000(1) E.F.R. 596*** it is argued by learned counsel for the appellants that the prosecution has not examined Constable Motilal who took the contraband for chemical examination and as such important link evidence is missing. There is also no evidence that the specimen of seal was deposited in Malkhana and thus there is a clear cut violation of the provisions of Sections 52, 55 and 57 of the Act and for the above reasons, the appellants deserve to be acquitted. In support of its arguments, he places his reliance in the matter of ***Ramgul @ Remulal and others Vs. State of M.P.*** reported in ***2003(1) E.F.R.220.***

9. Learned counsel for the appellants further argued that the police has not prepared any Panchnama with regard to keeping seized article and sample in safe custody of the Malkhana as also for taking samples from Malkhana for sending it to the chemical analyzer. It is submitted that quantity of seized contraband is shown as 20.100 kg, however, there is no evidence as to how weighment of the seized contraband was done. It is also not clear that whether the seized contraband was weighed along with the bag or without the bag. This aspect has definite significance, as the quantity of contraband is just 100 grams more than the commercial quantity. He further argues that the chemical examiner has clearly stated in its report that the contraband contained leaves, seeds and flowers. However, the percentage of leave, seed and flower has not been mentioned and as per Section 2(iii)(b) of the Act, the ganja is defined as "flowering or fruiting tops of the cannabis plant (excluding seeds and leaves when not accompanied by the tops)."

**10.** On the other hand, learned counsel for the State supports the judgment of the lower Court and submits that as per Section 35 and 54 of the Act, if the accused fails to account satisfactorily for the possession of narcotic drugs, presumption may be drawn against him that he has committed the offence with a culpable mental state. Placing his reliance in the matter of ***Madan Lal and another Vs. State of Himachal Pradesh*** reported in ***(2003)7 S.C.C. 465,*** learned counsel for the State submits that once possession is established, the burden is on the accused to prove that it is not the conscious possession. Further placing his reliance on the judgment delivered in the matter of ***P.P.Fathima Vs. State of Kerala*** reported in ***2003 (4) Crimes 390 (SC),*** he submits that merely because the Panch witnesses do not support the prosecution case by itself would not make prosecution case any less acceptable, if otherwise evidence regarding seizure was acceptable, the conviction is liable to be upheld.

**11.** Learned counsel for the State also submits that though the Panch witnesses have not supported the case of the prosecution but in any case they do not dispute their signatures and that the defence was not able to point out any material discrepancy in the statement of the I.O. which may render the same unreliable.

**12.** After hearing learned counsel for the respective parties and perusing the entire record I find;

1) that the prosecution has not placed any cogent and reliable evidence regarding seizure of the contraband from the appellants as the seizure witnesses have categorically stated that they put their signatures on the papers in the police station as per directions of the I.O. and further that all the documents were prepared in the police station.

2) that there is no evidence that the contraband were produced and duly exhibited during trial.

3) that apart from this, there are material irregularities in the investigation which renders the prosecution case doubtful. It is pertinent to note that the conviction is based on solitary testimony of the I.O. and the prosecution was duty bound to

prove that the seized article was properly sealed and kept intact till it reached to the laboratory for analysis. However, in the present case, samples of the seal in the Column No. 13 of the seizure memo is not available whereas it is a specific column and the same has also not been produced in the Court nor the seized contraband has been produced in the Court, therefore the original seal could not be tallied with the sample seal affixed on the Column No. 13 of the seizure memo.

4) that the I.O. has not explained this lacuna in his deposition which is evident from para 17 of his statement. It is also evident that the investigation in the instant matter was done before registration of the offence which he has admitted in para 17 of the statement.

5) that the I.O. is not able to state as to in what manner the weighment of the contraband was done.

6) that the prosecution has also not examined the Constable who had taken the articles for chemical examination and as such the important link is missing in the present case, thus there is no evidence that the sample of the seal which was used, was deposited along with the property in the Malkhana and kept intact.

7) that even the in-charge Malkhana has not been examined and the seal of the sample was also not deposited in the Malkhana along with the seized articles and thus, non-examination of the witnesses in whose possession the sample remained is fatal to the prosecution and the inevitable effect of this omission was that the prosecution failed to rule out the possibility of the samples to be changed or tampered with during the period in question.

**13.** It is true that the provisions of Section 52 and 57 are directory and violation of these provisions cannot ipso facto vitiate the trial or conviction. However, the I.O. cannot totally ignore these provisions and such failure

will have a bearing on approviation of evidence regarding arrest of accused or seizure of the article, as has been held by the Hon'ble Supreme Court in the matter of ***Gurbux Singh V. State of Haryana*** reported in ***2001 (3) SCC 28.***

14. So far as the judgments cited by learned counsel for the State are concerned, it is no doubt that in appropriate cases where the case of the prosecution is otherwise established beyond reasonable doubt, the non-examination of Panch witnesses is not fatal to the prosecution case and the accused persons can be convicted on the basis of other evidence available on record and the presumption as contained in Section 35 and 54 of the Act is available to the prosecution.

15. However, on the basis of aforesaid discussions, I am of the opinion that prosecution has failed to prove its case beyond all reasonable doubts against the appellants, therefore this appeal deserves to be allowed and it is accordingly allowed. The judgment of conviction and sentence passed by the learned trial Court is set aside and the appellants are directed to be released forthwith, if not required in any other case.

Sd/-
DHIRENDRA MISHRA
Judge